



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 14, 1998

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR98-0944

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 114885.

The Texas Department of Transportation (the "department") received a request for "a copy of the electronic file (Microstation) of the schematic for the proposed improvements along Texas Avenue between Kyle Street and Harvey Avenue." You state that the department has a common-law copyright to its designs pursuant to Transportation Code section 201.205 and that "[i]f the requestor would like to use the schematics, he should be asking the department for a license." You also assert that the requested information is excepted from required public disclosure based on section 552.110 of the Government Code.

Section 201.205 of the Transportation Code provides in pertinent part as follows:

- (a) The department may
 - (1) apply for, register, secure, hold and protect under the law of the United States, any state, or any nation a patent, copyright, trademark, or other evidence of protection or exclusivity issued in or for an idea, publication, or other original innovation fixed in a tangible medium, including:

...

- (E) a map or planning document;
- (F) an engineering, architectural, or graphic design.

If requested records are copyrighted, a governmental body is not required to furnish the requestor with copies of such records.¹ Members of the public may inspect copyrighted materials, unless such materials are excepted from public disclosure or otherwise protected by law. *See* 17 U.S.C. §§ 106, 107; *see* Attorney General Opinion JM-672 (987), Open Records Decision No. 550 (1990) at 8-9.

You raise section 552.110 of the Government Code. Section 552.110 excepts from disclosure two categories of information: (1) “[a] trade secret” and (2) “commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” In applying the “commercial or financial information” branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2.²

You have provided no information to support your claim that the requested information is excepted from disclosure based on section 552.110. A governmental body has the burden of proving that an exception applies to requested records. Open Records Decision No. 363 (1983). Thus, we conclude that the department has not established the applicability of section 552.110 to the requested information. Consequently, although the department need not release copies of the requested information, the department cannot deny the requestor the right to inspect such information based on section 552.110.

¹Members of the public may inspect copyrighted materials held as public records, and make copies of such records unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. Attorney General Opinion MW-307 (1981).

²This office also considers the following six factors in making trade secret determinations: 1) the extent to which the information is known outside of [the company’s] business; 2) the extent to which it is known by employees and others involved in [the company’s] business; 3) the extent of measures taken by [the company] to guard the secrecy of the information; 4) the value of the information to [the company] and to [its] competitors; 5) the amount of effort or money expended by [the company] in developing this information; 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS, § 757 (1939).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/rho

Ref.: ID# 114885

Enclosures: Submitted documents

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